2013 IL App (3d) 120049-UB

Order filed August 26, 2013
Modified upon denial of rehearing filed September 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0049
v.	)	Circuit No. 11-CF-67
	)	
RICKY RICHARDSON,	)	Honorable Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's sentence is vacated and the matter is remanded for resentencing on all counts because the trial court's misapprehension of the applicability of extended-term sentencing influenced its sentencing decision on all counts.

¶ 2 Defendant, Ricky Richardson, was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2008)), criminal sexual abuse (720 ILCS 5/12-15(a)(2) (West 2008)), and child pornography (720 ILCS 5/11-20.1(a)(1)(vii) (West 2008)). Defendant was sentenced to

consecutive terms of imprisonment of 30 years, 6 years, and 15 years, respectively. Defendant filed a motion to reconsider, which the trial court denied. Defendant appealed.

¶ 3 FACTS

¶ 4 At defendant's jury trial, the evidence indicated that 19-year-old defendant and 15-year-old A.R. met in the summer of 2010. They spent time together throughout the summer. On January 2, 2011, defendant called A.R., who was now 16 years old, to invite her out. Defendant obtained permission from A.R.'s mother, who agreed to allow A.R. to go out with defendant.

¶ 5 Defendant and Michael Alexander picked up A.R. from her house in the afternoon or early evening. They drove to an apartment, where Christopher Macklin answered the door. Inside the apartment, A.R. and the men talked and listened to music. A.R. was offered alcohol, but she declined. After A.R. drank two or three cups of Kool-Aid, she became sleepy and asked defendant to take her home. She was told that she would have to wait because someone borrowed the car. A.R. fell asleep.

¶ 6 A.R. remembered throwing up in the bathroom, during which time she saw a phone and her empty wallet on the floor. She picked up the phone and her wallet. The next thing she remembered was waking up in a hospital bed.

¶ 7 A.R.'s mother testified she tried telephoning A.R. some time after A.R. left with defendant. A.R. uncharacteristically did not answer her cellular telephone. Following her mother’s repeated attempts to telephone A.R., someone else answered A.R.'s cellular telephone. A.R.'s mother became worried and called the police. Police arrived at A.R.'s house at the same time A.R. was being dropped off at home by Alexander's girlfriend. A.R. appeared intoxicated. Police transported A.R. to the hospital. A sexual assault kit was collected from A.R.

¶ 8 A cellular telephone was found in A.R.'s possession. The cellular telephone contained 23 minutes of video depicting defendant, Alexander, and Macklin taking turns video-recording each other engaged in sexual acts with A.R. while she was unconscious.

¶ 9 The jury found defendant guilty of criminal sexual assault (Class 1 felony), criminal sexual abuse (Class 4 felony), and six counts of child pornography (Class 1 felony). The jury also found that the State proved the offense of criminal sexual assault was "committed on the same victim by one or more other individuals and the defendant voluntarily participated in the crime with the knowledge of the participation of the others in the crime and the commission of the crime was part of a single course of conduct during which there was no substantial change in the nature of the criminal objective."

¶ 10 At the sentencing hearing, the prosecutor conceded that the six counts of child pornography should merge into a single count based on one-act, one-crime principles. She also indicated that extended-term sentencing applied in this case because of defendant's criminal history and the jury's finding, which was consistent with section 5-5-3.2(c)(3) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(c)(3) (West 2010)).[1] The prosecutor indicated that the applicable extended-term sentencing range was 4 to 30 years of imprisonment for each

[1] Pursuant to section 5-5-3.2(c)(3) of the Code, a court may impose an extended-term sentence when the defendant is convicted of sexual assault and there is a finding that the offense was committed on the same victim by one or more other individuals, and the defendant voluntarily participated with knowledge of the others' participation in the crime, and the commission of the crime was part of a single course of conduct during which there was no substantial change in the nature of the criminal objective.

Class 1 felony count of criminal sexual assault and child pornography and 1 to 6 years of imprisonment for the Class 4 felony of criminal sexual abuse. Defendant's attorney agreed that defendant was extended-term eligible on each count.

¶ 11 When sentencing defendant, the trial judge indicated:

> "[T]hese will all run consecutive to each other, right or wrong. And I know the easy thing to do is just say, max on all of it[.] *** But I'm working based on the numbers, not on the magic word, maximum, although there will be that word stated on some of this, but I am working based on a calculation of numbers, not on a feel good moment of saying [defendant] got the maximum on each count, regardless of whatever the number is.
>
> So Count 1, criminal sexual assault, I am going to impose the maximum, 30 years at 85 percent. ***

¶ 12 * * *

> *** Count 2, criminal sexual abuse, the maximum, 6 years, day-for-day will apply[.] ***

¶ 13 * * *

> *** Count 6, child porn[ography] count, he will be given 15 years, day-for-day will apply."

¶ 14 Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant appealed.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant argues this case should be remanded for resentencing on his criminal sexual abuse and child pornography convictions because the trial court misapprehended the applicable sentencing ranges. Specifically, defendant argues the trial court: (1) erred by

imposing a sentence three years beyond the applicable maximum sentence for the criminal sexual abuse conviction; and (2) erroneously considered an extended-term sentencing range was applicable to the child pornography conviction.

¶ 17 First, defendant admits he forfeited the sentencing issues by failing to object at the sentencing hearing and in a postsentencing motion. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (to preserve an issue for appellate review, a party must raise the issue before the trial court and in a posttrial motion). However, sentences that do not conform to statutory requirements are void and may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19 (2004).

¶ 18 When a defendant has been convicted of multiple but differing classes of offenses, an extended-term sentence may only be imposed for the conviction or convictions within the most serious class. See *People v. Jordan*, 103 Ill. 2d 192 (1984).

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence *** for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 [of the Code] were found to be present." 730 ILCS 5/5-8-2(a) (West 2010).

Therefore, where a defendant is convicted of multiple offenses, the imposition of an extended-term sentence is limited, as a consideration for the court, to only those offenses within the most serious class. *Jordan*, 103 Ill. 2d 192.

¶ 19 In the case at bar, the jury returned multiple guilty verdicts for differing classes of offenses. The most serious offenses included defendant's Class 1 felony convictions for criminal sexual assault and child pornography, both class 1 felonies. A Class 1 felony carries a range of

punishment of 4 to 15 years with the possibility of an extended term sentence of up to 30-years. 730 ILCS 5/5-4.5-30(a) (West 2010). Defendant does not challenge his 30-year extended term sentence for criminal sexual assault.

¶ 20 However, defendant also received an extended term sentence for a lesser class offense. Specifically, the court imposed a maximum extended term sentence of six years for the Class 4 felony of criminal sexual abuse, which carries a non-extended range of punishment of one to three years imprisonment. 730 ILCS 5/5-4.5-45(a) (West 2010). Thus, the imposition of an extended-term sentence for the criminal sexual abuse was improper since criminal sexual abuse was classified as a lesser offense, a Class 4 felony. See 730 ILCS 5/5-8-2(a) (West 2011); *People v. Bell*, 196 Ill. 2d 343 (2001).

¶ 21 In some cases, an extended-term sentence may be imposed on separately charged, differing class offenses that arise from an " 'unrelated courses of conduct.' " *Bell*, 196 Ill. 2d at 350, quoting *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). However, the jury's finding that "the crime was part of a single course of conduct during which there was no substantial change in the nature of the criminal objective" will not justify the sentence on that basis. 730 ILCS 5/5-5-3.2(c)(3) (West 2010). Consequently, we vacate the extended-term sentence imposed on defendant's Class 4 criminal sexual abuse conviction.

¶ 22 Next, defendant argues his sentence for the Class 1 offense of child pornography conviction should also be set aside by this court. Defendant points out that his criminal sexual assault conviction should be viewed by this court as the most serious Class 1 felony conviction he received in this case because he will be required to serve 85% of that sentence. Since he is eligible for day-for-day sentencing credit against his sentence for child pornography, also

classified as a Class 1 felony, he contends the criminal sexual assault conviction is the only conviction that the trial court could have properly *considered* to be subject to an extended-term sentence. See 730 ILCS 5/3-6-3(a)(2)(ii), (2.1) (West 2010).

¶ 23 Our supreme court has construed the language of section 5-8-2(a) as "the legislature intend[ing] that more than one extended-term sentence may be imposed" but only for the offenses within the most serious class of offense of which the accused was convicted. *Jordan*, 103 Ill. 2d at 207; see, *e.g.*, *People v. George*, 326 Ill. App. 3d 1096 (2002) (providing that defendant was ineligible for extended-term sentencing on his three less serious class offenses, but eligible for extended-term sentences on two Class X felony offenses that were both within the most serious class). Based on existing case law, we conclude the classification of the offense controls in this case, rather than the nature of the percentage of the sentence to be served according to statute. We conclude the trial court properly considered the prosecutor's recommendation to impose an extended-term sentence for both Class 1 felonies but could not consider an extended term-sentence, as imposed, for the Class 4 felony of criminal sexual abuse.

¶ 24 The case law provides that a trial court's misapprehension concerning extended-term sentencing eligibility will necessitate a new sentencing hearing when it appears the court's misapprehension influenced the trial court's sentencing decision. *People v. Hill*, 294 Ill. App. 3d 962 (1998). When considering whether a judge's mistaken belief influenced the sentence, a reviewing court considers the judge's comments to determine if the mistaken belief served as a reference point when fashioning the sentence. *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000).

¶ 25 Here, the record shows the circuit court sentenced defendant based on the trial judge's "calculation of numbers." This reference by the judge, suggests the aggregate sentence of 51

years of imprisonment was calculated based upon the trial court's erroneous belief that defendant was eligible for extended-term sentencing on all counts, both Class 1 felonies *and* the Class 4 felony, in spite of differing classifications. Therefore, we remand for resentencing on all counts.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm defendant's convictions, vacate the sentences imposed by the circuit court of Peoria County, and remand for resentencing.

¶ 28 Affirmed in part and vacated in part; caused remanded.